Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

WARDEN OF CALIFORNIA MEN'S COLONY, *Petitioner,*

v.

GREGORY DEAN CALIENDO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code prohibits a federal court from granting a state prisoner habeas corpus relief as to a claim adjudicated by a state court unless the state court's decision was contrary to, or an unreasonable application of, "clearly established" Supreme Court precedent. In *United States v. Olano*, 507 U.S. 725, 739 (1993), this Court observed that the "ultimate inquiry" in jury intrusion cases is whether the intrusion affected the jury's deliberations. Here, the Ninth Circuit held that the state court's finding that no prejudice had resulted from a jury intrusion was contrary to Supreme Court precedent because the state court did not apply a *presumption* of prejudice, even though it conducted a full hearing before making the finding.

The Question Presented is:

Whether this Court's precedents "clearly establish" that the Constitution requires application of a presumption of prejudice in cases of jury intrusion.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. State Court Proceedings	2
B. District Court Habeas Corpus Proceedings	4
C. Ninth Circuit Proceedings	5
REASONS FOR GRANTING THE WRIT	6
A. The Ninth Circuit's Decision Violates The AEDPA Because It Rests On Precedent That Even This Court Itself Has Signaled Is Unclear	7
B. The Question Presented Is Important And Recurring And Has Led To Division Among The Lower Courts	10
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
Cases	
Agnew v. Leibach 250 F.3d 1123 (7th Cir. 2001)	11
Brecht v. Abrahamson 507 U.S. 619 (1993)	11
Caliendo v. Warden of California Men's Colony 365 F.3d 691 (9th Cir. 2004)	1
Crease v. McKune 189 F.3d 1188 (10th Cir. 1999)	11
Early v. Packer 537 U.S. 3 (2002)	10
Fullwood v. Lee 290 F.3d 663 (4th Cir. 2002)	11
Gonzales v. Beto 405 U.S. 1052 (1972)	5, 9
Lee v. Marshall 42 F.3d 1296 (9th Cir. 1995)	11
Lockyer v. Andrade 538 U.S. 63 (2003)	8, 10, 11
Manning v. Huffman 269 F.3d 720 (6th Cir. 2001)	11
Mattox v. United States 146 U.S. 140 (1892)	5-7, 9-11

TABLE OF AUTHORITIES (continued)

	Page
Middleton v. McNeil 124 S. Ct. 1830 (2004)	10
Mitchell v. Esparza 540 U.S. 12 (2003)	8, 10
Parker v. Gladden 385 U.S. 363 (1966)	9
Remmer v. United States 347 U.S. 227 (1954)	5, 9, 11
Smith v. Philips 455 U.S. 209 (1982)	5
Turner v. Louisiana 379 U.S. 466 (1965)	5, 9
United States v. Olano 507 U.S. 725 (1993)	i, 4, 7, 8, 10
Woodford v. Visciotti 537 U.S. 19 (2002)	10
Yarborough v. Gentry 540 U.S. 1 (2003)	10
Statutes	
28 U.S.C. § 1254	2
28 U.S.C. § 2254	i, 2, 4, 7

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

5 LaFave, Israel, & King, Criminal Procedure
§ 24.9(f), p. 602 (2nd Ed. 1999) 9

INDEX TO APPENDICES

Appendix	Description	Page
A	Ninth Circuit Order Granting Appellee's Motion for Stay of Mandate	A1
B	Ninth Circuit Order Denying Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc	B1
C	Ninth Circuit Opinion of April 5, 2004	C1-C13
D	Ninth Circuit Order Withdrawing Opinion of January 9, 2004, Replacing Opinion in Its Entirety, and Denying Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc	D1-D2
E	Ninth Circuit Opinion of January 9, 2004	E1-E13
F	U.S. District Court Order Entering Judgment Denying Relief	F1
G	U.S. District Court Order Adopting the Magistrate Judges's Report and Recommendation	G1
H	Report and Recommendation of U.S. Magistrate Judge	H1-H20

INDEX TO APPENDICES

Appendix	Description	Page
I	California Supreme Court Order Denying Petition for Review	I1
J	California Court of Appeal Opinion	J1-J14
K	Excerpts from Reporter's Transcript	K1-K42

IN THE SUPREME COURT OF THE UNITED STATES

No.

WARDEN OF CALIFORNIA MEN'S COLONY, *Petitioner,*

v.

GREGORY DEAN CALIENDO, *Respondent.*

Petitioner John Marshall, Warden of the California Men's Colony, at San Luis Obispo, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The Ninth Circuit's opinion is reported as *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691 (9th Cir. 2004). The order of the United States District Court for the Central District of California is unreported. Both are reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit reversing the judgment of the District Court with instructions that Caliendo be released or granted a new trial within seventy days of the issuance of the court's mandate was filed on April 5, 2004. App. C. The Ninth Circuit denied the Warden's petition for rehearing with

suggestion for rehearing en banc on June 12, 2004. App. B. This Court's jurisdiction lies under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. State Court Proceedings

Just past midnight on the morning of July 22, 1995, Los Angeles County Sheriff's deputies discovered respondent Caliendo inside a car that appeared to have been broken into. One of the windows of the car was shattered, and Caliendo was underneath the dashboard holding a screwdriver. The owner of the car later confirmed that several belongings he had left in the car were missing. Those items were not found on Caliendo or in the vicinity of the car. In an interview with Los Angeles County Sheriff's Detective John Mundell, Caliendo admitted he had broken into the car but claimed he did so only because he

needed somewhere to sleep after his wife had kicked him out of their apartment.

Caliendo was tried for second degree burglary of a vehicle. Among other evidence presented by the prosecution, Detective Mundell testified that Caliendo admitted breaking into the car. Relying on the state of the evidence and the testimony of his wife, Caliendo's defense was that the car had already been broken into when he decided to use it as a place to sleep. The jury deadlocked, and a mistrial was declared.

On retrial, Detective Mundell was seen having a conversation with several jurors for approximately fifteen minutes outside the courtroom during a break in the proceedings. Upon being informed of the contact, the court immediately held a hearing. The court first questioned Detective Mundell outside the presence of the jury. Detective Mundell admitted that he had talked to two or three jurors but explained that they had not discussed any matters pertaining to the case. He told the court that the conversation had consisted only of "small talk" about such topics as baseball, small towns, and his workload. App. K at 6-10.

The court then questioned the jury about the contact. Three jurors stated that they had talked to Detective Mundell outside the courtroom. The jurors confirmed that they had not discussed anything concerning the case. One of the jurors told the court that he and Detective Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer." The second juror had talked to Detective Mundell about his workload and his exercise regimen. The third juror had only asked Detective Mundell what time he thought the proceedings would resume. Other jurors, as well as an independent witness, stated that they had not overheard any conversation about the case between the three jurors and Detective Mundell. The court asked each juror individually

whether the incident would affect his or her judgment, and each juror affirmed that it would not. App. K at 11-20.

The court denied Caliendo's mistrial motion, finding that the contact with Detective Mundell would not affect the jury's judgment. The jury ultimately found Caliendo guilty. Subsequently, the court denied Caliendo's new trial motion, app. K at 25-42, and sentenced him under California's Three Strikes Law to a term of twenty-five years to life in state prison.

Caliendo appealed from the judgment of conviction, arguing, inter alia, that the jury intrusion raised a presumption of prejudice that the prosecution should have been obligated to rebut, and that the prosecution, on this record, could not rebut. The California Court of Appeal affirmed Caliendo's conviction, holding that, while Detective Mundell's conversation with the jurors was "improper and fraught with the danger of improper influence and communication of extraneous information," no presumption of prejudice was applicable. The court of appeal also concluded that "the record as a whole discloses no reasonable probability of actual harm" to Caliendo because the conversation between Detective Mundell and the jurors did not have any tendency to influence the jurors and all of the jurors averred that their judgment would not be affected by the conversation. App. J.

The California Supreme Court denied Caliendo's petition for review. App. I.

B. District Court Habeas Corpus Proceedings

Caliendo filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, pursuant to 28 U.S.C. § 2254, again raising his claim that the jury intrusion should have given rise to a rebuttable presumption of prejudice. Applying the strict standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the District Court agreed with the California Court of Appeal that the conversation between

Detective Mundell and the jurors, although improper, did not give rise to a presumption of prejudice. Specifically, citing this Court's opinion in *United States v. Olano*, 507 U.S. 725, 738-39 (1993), the District Court found that this Court's precedent could reasonably be interpreted as requiring Caliendo to prove prejudice because the intrusion had been "minimal." The District Court also found that there was no showing of actual prejudice in this case. Again citing *Olano*, the District Court observed that the "ultimate inquiry" in jury intrusion cases is simply, "Did the intrusion affect the jury's deliberations and therefore its verdict?" Based on the evidence adduced at the state court's hearing concerning Detective Mundell's conversation with the jurors, the District Court found that the state court's determination that no prejudice had resulted from the jury intrusion was not unreasonable under the AEDPA. The District Court therefore denied Caliendo's petition. App. F-H.

C. Ninth Circuit Proceedings

Caliendo appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's judgment. In a published opinion, the Ninth Circuit panel identified a three-tiered analytical framework it held to be applicable as a constitutional matter in jury intrusion cases. First, relying on *Smith v. Philips*, 455 U.S. 209, 217 (1982), and *Gonzales v. Beto*, 405 U.S. 1052, 1058, 1055 (1972) (memorandum dissent and concurrence), the court found that where the intrusion is de minimis, the defendant must make an affirmative showing of prejudice. App. C at 9-10. Second, citing *Mattox v. United States*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227, 228 (1954), the court held that where the intrusion is not de minimis, i.e., where it "raises a risk of influencing the verdict," prejudice is presumed but may be rebutted by the prosecution. App. C at 7-9. Third, pointing to *Turner v. Louisiana*, 379 U.S. 466 (1965), the court concluded that where the intrusion is "continuous and intimate,"

a conclusive presumption is applied. App. C at 8 n.2. The panel determined that this case fell into the second category and that the California Court of Appeal's failure to identify and apply the "*Mattox* Rule" was "contrary to the governing law set forth by the Supreme Court in *Mattox*." App. C at 12.

The Ninth Circuit panel went on to hold that, because the state court's determination that no prejudice resulted from the jury intrusion had been reached through the application of an erroneous legal standard, the panel could not defer to the state court's conclusion. In its original published opinion, the panel, conducting a de novo review, found that "the government rebutted the *Mattox* presumption by making a strong contrary showing that the contact between Mundell and the three jurors was harmless." App. E at 12. However, the panel unanimously reversed course three months later and issued a superseding published opinion finding that "the government did not make a strong showing that the contact between Detective Mundell and the three jurors was harmless." App. C at 12. In the superseding opinion, the Ninth Circuit panel thus reversed the District Court's judgment with directions that Caliendo be released or retried within seventy days of the issuance of the court's mandate. App. C at 13.

The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc on May 12, 2004. App. B. The Warden filed a motion to stay the issuance of the mandate, which, on June 21, 2004, the Ninth Circuit granted. App. A.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit in this case discerned in this Court's precedents a "clearly established" federal constitutional rule mandating a rebuttable presumption of prejudice in certain jury intrusion cases and held that the state court's decision could not survive habeas corpus review under the AEDPA because the state court, despite holding a full hearing to assess the

prejudicial impact of the jury intrusion, failed to apply the rebuttable presumption. This decision flouted the AEDPA's strict standard of review. The Ninth Circuit disregarded this Court's latest jury intrusion decision, *United States v. Olano*, 507 U.S. 725 (1993), in which this Court itself signaled that its precedent on the issue was *not* clear and that the "ultimate inquiry" in such cases is simply whether the intrusion affected the jury's deliberations. Instead, the Ninth Circuit relied selectively on a body of precedent, including *Mattox v. United States*, 146 U.S. 140, 150 (1892), whose contours and constitutional underpinnings are unclear. The Ninth Circuit's characterization of the *Mattox* presumption as a "clearly established" federal constitutional rule is thus manifestly incorrect.

The importance of federal courts' adherence to the AEDPA's stringent standard of review has been repeatedly underscored by this Court. And the question of whether and how a presumption of prejudice should be applied in jury intrusion cases is a recurring one. Indeed, the federal appellate courts are divided as to whether *Mattox* is even a constitutionally-based decision and therefore applicable on habeas corpus. This Court should grant certiorari to address this important and recurring issue and to reverse the Ninth Circuit's unfounded, published holding that a constitutionally compelled rebuttable presumption of prejudice in jury intrusion cases is "clearly established" for purposes of AEDPA review.

A. The Ninth Circuit's Decision Violates The AEDPA Because It Rests On Precedent That Even This Court Itself Has Signaled Is Unclear

One of the cornerstones of the reform of federal habeas corpus review wrought by the AEDPA is the insistence that relief may be granted on a claim adjudicated by a state court only if the state court's legal decision was contrary to, or an unreasonable application of, "clearly established" Supreme

Court precedent. 28 U.S.C. § 2254(d). Only recently, this Court emphasized that "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 124 S. Ct. 7, 11 (2003); see also *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (precedent that is unclear or inconsistent may not serve as the basis for habeas corpus relief under the AEDPA.) The Ninth Circuit's three-tiered framework for analyzing jury intrusion cases, and in particular its assertion that a rebuttable presumption of prejudice applies to cases such as this one, does not rest on "clearly established" law as determined by this Court.

In *United States v. Olano*, this Court, after surveying several of its leading jury intrusion decisions, said:

> There may be cases where an intrusion should be presumed prejudicial, see, *e.g.*, *Patton* [*v. Yount*, 467 U.S. 1025, 1031-35 (1986)]; *Turner v. Louisiana*, 379 U.S. 466 . . . (1965), but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?

United States v. Olano, 507 U.S. at 739. The Court in using this language appears to have acknowledged the unsettled state of its jury intrusion jurisprudence. At the same time, the Court made clear that what matters in the final analysis is not whether a particular presumption is applied but only that a court actually make an inquiry into the extent of the possible prejudice arising from the intrusion. The state court here undertook precisely the "ultimate inquiry" described in *Olano*, holding a full hearing to determine whether the jury was actually prejudiced by Detective Mundell's intrusion. But in spite of *Olano*, the Ninth Circuit found the state court's adjudication contrary to clearly established Supreme Court precedent because the state court

made its determination without applying a presumption. This holding cannot follow from *Olano*.

Moreover, the jury intrusion framework that the Ninth Circuit considered to be clearly established ignores the very ambiguity in the jury intrusion decisions to which *Olano* spoke. See 5 LaFave, Israel, & King, Criminal Procedure § 24.9(f), p. 602 (2nd Ed. 1999) ("The method by which [the prejudice] assessment must take place, however, is not settled. Courts disagree, as a preliminary matter, when the defendant must prove, or the prosecutor must disprove, prejudice."). It is an open question, for example, whether a presumption applies where, as here, the intrusion was neither continuous and intimate nor involved communication directly related to the case. This Court has indicated that jury intrusion might rise to the level of a constitutional violation in only a handful of cases, and all of those cases involved either "continuous and intimate contact" or contact concerning the case itself. See *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (bailiff commented to jury on defendant's guilt); *Turner v. Louisiana*, 379 U.S. 466, 473-74 (1965) (two central peace officer witnesses for prosecution also acted as bailiffs during trial); see also *Gonzales v. Beto*, 405 U.S. 1052, 1053-56 (1972) (memorandum concurrence) (sheriff played "dual role" of bailiff and key prosecution witness); 5 LaFave, Israel, & King, *supra*, at 605. Even in *Remmer* – which, like *Mattox*, involved case-related contact – this Court said, "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial *about the matter pending before the jury* is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added). It is also questionable whether the *Mattox* decision even has any bearing in habeas corpus cases, since nothing in *Mattox* or *Remmer*, both of which were direct federal criminal appeals, suggests that the rule of presumed prejudice they set out has *constitutional* underpinnings.

It was undisputed in this case that Detective Mundell's contact with the three jurors was limited to the single brief occasion outside the courtroom during a recess and that their conversation did not in any way concern the case. The District Court thus held that a state court could reasonably read this Court's decisions as not requiring a presumption of prejudice under the present circumstances because the intrusion had involved "only one isolated incident of improper contact." And the District Court found the state court adjudication reasonable because there was "sufficient support in the record and the relevant case law for the state courts' finding that [Caliendo] was not prejudiced by the improper contact between Mundell and the jurors." App. H at 7, 10. Yet, the Ninth Circuit reversed the District Court because "the state court's analysis was framed erroneously," in that it failed to apply the *Mattox* presumption. App. C at 7. By disregarding the ambiguity in this area and dismissing the applicability of *Olano*, app. C at 10 n.3, the Ninth Circuit at once misapplied the AEDPA, perpetuated the uncertainty concerning the constitutional boundaries of jury intrusion law, and significantly undermined state courts' reasonable reliance on *Olano* as establishing the "ultimate inquiry" required in the context of jury intrusion.

B. The Question Presented Is Important And Recurring And Has Led To Division Among The Lower Courts

The question presented in this case is an important one, affecting the standard of review applicable in all federal habeas corpus cases brought by state prisoners. This Court has repeatedly stressed that federal habeas courts must afford state courts the deference owed to them under the AEDPA's stringent standard of review. See, *e.g.*, *Middleton v. McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam).

Nonetheless, here, that important deference has again been misapplied, this time in relation to the AEDPA's "clearly established" requirement. See *Mitchell v. Esparza*, 124 S. Ct. at 11; *Lockyer v. Andrade*, 538 U.S. at 71-72.

The issue, moreover, of how a presumption of prejudice should be construed in habeas corpus cases is recurring, as evidenced by the quantity of published decisions on the subject. See, *e.g.*, *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002); *Manning v. Huffman*, 269 F.3d 720 (6th Cir. 2001); *Agnew v. Leibach*, 250 F.3d 1123 (7th Cir. 2001); *Crease v. McKune*, 189 F.3d 1188 (10th Cir. 1999); *Lee v. Marshall*, 42 F.3d 1296, 1298-99 (9th Cir. 1995). And lower courts have been unable to reach a consensus even on the fundamental issue of whether *Mattox* and *Remmer* are applicable on habeas corpus. The Fourth Circuit, like the Ninth Circuit here, has followed *Remmer* in the habeas corpus context and found that certain jury intrusions raise a presumption of prejudice that may be rebutted by the prosecution. *Fullwood v. Lee*, 290 F.3d at 677-79. But the Tenth Circuit has held to the contrary: "We view the *Remmer* presumption as a rule of federal criminal procedure, rather than a rule of federal constitutional law. . . . Interests of comity and federalism, as well as 'the State's interest in the finality of convictions that have survived direct review within the state court system,' mandate a more deferential standard of review" on federal habeas corpus. *Crease v. McKune*, 189 F.3d at 1193 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

The jury intrusion precedent has provided no consistent path for the lower courts to follow in assessing prejudice. Cf. *Lockyer v. Andrade*, 538 U.S. at 72. The Ninth Circuit's decision that the *Mattox* rule is clearly established constitutional law that requires reversal of the state court's adjudication is therefore indefensible under the AEDPA. This Court should grant certiorari and reverse the Ninth Circuit's plainly unfounded pronouncement that, as a constitutional matter, a state court must apply a rebuttable presumption of prejudice in

jury intrusion cases in order to survive federal habeas corpus review under the AEDPA.

CONCLUSION

For all of the foregoing reasons, the Warden respectfully asks that the Court grant the petition for writ of certiorari.

Dated: August 6, 2004

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